



OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

GERALD C. MANN  
ATTORNEY GENERAL

Honorable D. C. Greer  
State Highway Engineer  
Texas Highway Department  
Austin, Texas

Dear Sir:

Opinion No. O-2532

Re: Application of Article 1580,  
Texas Penal Code, to highway  
construction work.

We acknowledge receipt of your letter of July 10, 1940, in which you request the opinion of this department upon the following fact situation:

"The Highway Department has contracted for the construction of a number of highways in Texas, and is paying the entire cost of such construction from State funds; that is, the Federal Government is not participating in the cost of the work.

"It has always been our understanding that the 8-hour limitation in Article 1580, Texas Penal Code, did not apply upon projects financed in whole or in part from Federal funds if the rules or regulations of the interested Federal Agency required or permitted longer hours, however, upon projects financed wholly from State funds we have conscientiously observed all of the provisions in the act. Since the passage of the Fair Labor Standards Act of 1938 (U.S.C.A. Title 29, Secs. 201 to 219), we have not attempted to decide which law governed but have included in all contracts a notice to contractors that all applicable laws pertaining to labor are a part of such contract. It

now seems to be necessary to determine which of the acts, the State or the Federal, governs the working hours of labor on jobs in which the Federal Government does not participate, and we would appreciate receiving your advice in this matter."

That portion of Article 1580 of the Texas Penal Code which is applicable to the situation at hand reads as follows:

"All contracts made by or on behalf of the State of Texas, or by or on behalf of any county, municipality or other legal or political subdivision of the State, with any corporation, person or association of persons for performance of any work, shall be deemed and considered as made upon the basis of eight (8) hours constituting a day's work. The time consumed by the laborer in going to and returning from the place of work shall not be considered as part of the hours of work. It shall be unlawful for any corporation, person or association of persons having a contract with the State or any political subdivision thereof, to require or permit any such laborers, workmen, or mechanics to work more than eight (8) hours per calendar day in doing such work, except in cases of emergency, which may arise in times of war, or in cases where it may become necessary to work more than eight (8) hours per calendar day for the protection of property, human life or the necessity of housing inmates of public institutions in case of fire or destruction by the elements or in cases where the total number of hours per week required or permitted of any such laborer, workman or mechanic, engaged on work financed in whole or in part by the Federal Government or any agency thereof, does not exceed the number of hours per week allowed by any regulation of the Federal Government or any agency thereof. In such emergencies the laborers, workmen, or mechanics so employed and working to exceed eight (8) hours per calendar day shall be paid on the basis of eight (8) hours constituting a day's work. . ."

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The following definition is from Section 203,  
Ch. 8, Title 29, U. S. C. A.:

"(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any state or political subdivision of a state, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

You will note that the Texas statute is directly in point. Moreover, the Federal Act specifically excepts a state or a political subdivision of a state from the requirements of the Fair Labor Standards Act. It is the opinion of this department that the provisions of Article 1500, Texas Penal Code must be observed and enforced, and that it is not within the power or province of the Highway Department to waive such provisions.

Yours very truly

ATTORNEY GENERAL OF TEXAS

BY

*Ross Carlton*  
Ross Carlton  
Assistant

RC:ew

APPROVED JUL 23, 1940

*George C. Mason*  
ATTORNEY GENERAL OF TEXAS

